No. 10-868

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW CATE, SECRETARY, Petitioner,

v.

JOHN H. PIRTLE, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 18 U.S.C. §3006A(d)(7) and Rule 39 of this Court, Respondent John H. Pirtle requests leave to file the accompanying Brief in Opposition to the petition for writ of certiorari without prepayment of fees or costs, and to proceed *in forma pauperis*. Mr. Pirtle was represented by the Office of the Federal Defender in the United States District Court and the United States Court of Appeals by appointment pursuant to Title 18 U.S.C. § 3006(A).

Dated: March 3, 2011

Respectfully submitted,

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No. 10-868

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW CATE, SECRETARY,

Petitioner,

v.

JOHN H. PIRTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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LIST OF PARTIES

In the petition for a writ of certiorari multiple petitioners and respondents are named. Changes in custody status and judgments have affected the party list.

Respondent Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, has constructive custody of those respondents released from prison on some form of supervision: John H. Pirtle, who is on state parole; Robert Johnson, who is on federal supervised release pending completion of this appeal; Anthony Sneed, who is on state parole. Respondent Michael Slater is free of all forms of custody. Warden Hartley, the warden of prison from which Mr. Sneed was released to parole, no longer has custody of Sneed and so does not appear to be a proper petitioner in this matter.

As the United States Court of Appeals for the Ninth Circuit vacated its decision in Respondent Ron Mosley's case, Mr. Mosley does not appear to be a properly named respondent in this matter.

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IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW CATE, SECRETARY,

California Deports of Corrections and Rehabilitation,

Petitioner,

v.

JOHN H. PIRTLE,

Respondent.

BRIEF IN OPPOSITION

Petitioner seeks review of the identical question presented to and summarily answered by this Court in *Swarthout v. Cooke*, 526 U.S. ___, 131 S. Ct. 859, 178 L. Ed. 2d 732 (Jan. 24, 2011)(*per curiam*). Petitioner Cate's request for certiorari review should be denied because Respondent Pirtle's case is now moot. Mr. Pirtle's federal habeas claim solely concerned the denial of parole Respondent Pirtle received in 2002. He has since had another suitability hearings and, on August 10, 2010, the California Board of Parole Hearings found Pirtle suitable for parole. The Board set his total term

of imprisonment at 123 months. As of that time, Pirtle had served over 30 years, or 360 months in prison. Under California law, the Board's parole suitability decision was not final for 120 days and, after that period, could be reviewed by the California governor. The Governor had until January 7, 2011 to affirm, modify, or reverse this decision. The Governor took no action on Respondent Pirtle's case, which meant under California law that the parole grant decision stands. Respondent Pirtle is currently out of prison, on parole.

When Mr. Pirtle's case presented a live controversy, the district court required the parole board to set a term for Pirtle within a set amount of time, based upon Mr. Pirtle's status in 2002. Instead, and over Pirtle's objection, the California Board of Parole Hearings conducted a full new parole suitability hearing. *See* BIO Appendix, pages 5-6.[1] The Board examined Mr. Pirtle's status in 2010 and found he was suitable for parole because in 2010 he did not present an unreasonable risk of danger to the public. *Id.* at 43-46. The parole board's grant decision was final on December 9, 2010. *Id.* at 49. The 30-day period during which the state governor had authority under Article V, section 8(b) of the California Constitution to review this parole grant

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[1] The parole board's decision paperwork for this hearing was made part of the district court record. *Pirtle v. California Board of Prison Terms*, 2:04-cv-0518, docket entry no. 45 (filed August 13, 2010). The full transcript was not available at that time, but it is subject to judicial notice pursuant to Rule 201, Federal Rules of Evidence. *Biggs v. Terhune*, 334 F.3d 910, 915 n.3 (9th Cir. 2003).

decision and, if he so decided, to " affirm, modify, or reverse" the Board, has now expired.[2] These intervening acts -- the Board independently finding Respondent Pirtle suitable for parole in 2010 and that decision passing through the board's decision review and the gubernatorial review periods without change -- moots Petitioner Cate's challenge to the appellate court's judgment.

Respondent Pirtle's case also stands in unique contrast with the other named respondents and with the respondents in this Court's recently decided *Cooke* case. Petitioner Cate does not present a challenge to the appellate court's decision to *de novo* review the federal constitutional based substantive due process[3] claim, yet Pirtle's case was decided only upon this basis. Thus, Pirtle's case is not one which warrants certiorari review because the judgment sought to be reviewed does not present the question Petitioner Cate seeks to raise.

OPINIONS AND ORDERS BY COURTS AND ADMINISTRATIVE AGENCIES

In addition to the materials included in the Petitioner's appendix, the transcript of the August 11, 2010, parole board hearing at which Pirtle was found suitable for parole and had a term set is material to the consideration of the petition. This

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[2] This period for gubernatorial review ended on January 7, 2011.

[3] Throughout, our reference to due process is the substantive due process guaranteed by the U.S. Constitution's Fourteenth Amendment.

transcript is reproduced in full in the BIO Appendix, pages 1-50.

STATEMENT OF THE CASE

1. Respondent John H. Pirtle was convicted of the second degree murder of his wife in 1980. He received a sentence of 17 years to life with the possibility of parole. Pirtle became eligible for parole in August 1989. Since then, he has been periodically considered for parole. At his initial parole suitability hearing, the Board determined that Pirtle was "suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." The Board found that Pirtle committed the crime "as a result of significant stress in his life," that he showed remorse, and that he accepted responsibility for his actions. It also found that Pirtle had a stable social history prior to his marriage to the victim, had no juvenile or adult convictions for violent offenses, had performed well in his prison job assignments, had matured since his crime, had received positive psychiatric reports, and had developed realistic plans for his parole. The Board set his release date for December 30, 1994.

In March 1994, however, the Board rescinded Pirtle's parole. It found that the previous panel had not given sufficient weight to the gravity of the original offense, the fact that he had been carrying a concealed weapon, or his history of alcohol abuse, crime, and domestic violence. The Board denied Pirtle's parole again in 1995, 1996,

1998, and 2002. Each time, the Board relied on the circumstances of Pirtle's crime, his history of criminal conduct, and his failure to attend a substance abuse program. Pirtle challenged the Board's 2002 denial of parole as violating his substantive due process right to be free of the arbitrary denial of his state-created liberty interest in release to parole absent some evidence that he posed a current risk of danger to the public.

2. The governing California parole statute provides that a parole release date "shall normally" be set once a prisoner becomes eligible for parole. Cal.Pen.Code §3041(a). The statute provides only a single basis for denying an eligible prisoner parole: his release would pose a risk to public safety. Cal.Pen.Code § 3041(b); *In re Lawrence*, 44 Cal.4th 1181, 190 P.3d 535 (Cal. 2008); *In re Shaputis*, 44 Cal.4th 1241, 190 P.3d 573 (Cal. 2008).

3. In granting habeas relief, the district court determined that the state-created liberty interest in parole gave Pirtle a federally protected due process right to be free of the arbitrary denial of release to parole: that is, absent evidence that he posed a current risk of safety to the public Pirtle had a right protected by the federal constitution's substantive due process clause to be found suitable for parole. The district court's decision predated the analysis used by the United States Court of Appeals for the Ninth Circuit in later cases, such as *Cooke v. Solis*, 606 F.3d 1206 (9th

Cir. 2010), *reversed by Swarthout v. Cooke*, 526 U.S. __, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011), and *Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010) (en banc). In granting habeas relief, the district court required the state parole board to "set a parole date for petitioner within thirty days from the date of this order." Appendix to Petition, vol. I, page 85a.

This remedial order was stayed until the Ninth Circuit issued its decision on July 12, 2010, which affirmed the district court's judgment. The state requested from the Ninth Circuit a stay of the remedial order pending consideration of its petition for rehearing en banc. That stay request and the petition for rehearing were both denied on October 20, 2010. The stay request was denied as moot.

4. Meanwhile, on August 11, 2010, the Board of Parole Hearings conducted for Pirtle more than a term-setting hearing, but a full subsequent parole suitability hearing. BIO Appendix. At that hearing, the Board considered all the evidence in Pirtle's prison central file, as well as all the evidence and argument presented at the hearing. After deliberating, the board panel found Pirtle suitable for parole. BIO Appendix, passim. It then set his final term at 124 months. *Id.* page 48. By the time of the August 2010 hearing, Respondent Pirtle had already served just over 30 years in prison and jail for his commitment offense.

5. Respondent Pirtle then sought and the district court granted his release

pending appeal. During this period, Respondent Pirtle has been supervised by a state parole officer. He was released to parole on September 7, 2010. Pirtle has fully complied with all conditions of parole during the five and a half months he has been released on parole. His sentence requires him to serve a period of parole of no more than five years.

6. The decision of the Board of Parole Hearings to grant Respondent Pirtle parole was final as to Board on December 8, 2010. BIO Appendix, page 49. The state governor's thirty-day period for affirming, modifying, or reversing this parole grant expired on January 7, 2011. *See* Cal. Const. Art. V, section 8(b).

REASONS FOR DENYING THE WRIT

A. This Case is Now Moot

Before addressing the merits of an appeal or petition for certiorari, this Court must assure itself that it has jurisdiction to decide the case. This principle is found directly in Article III of the United States Constitution which limits federal judicial power only to "Cases" and "Controversies." U.S. Const., art. III, § 2; *Flast v. Cohen*, 392 U.S. 83, 94-95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).[4] A "suit must remain

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[4] "[T]he judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two

alive throughout the course of litigation, to the moment of final appellate disposition." 13B Charles Alan Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3533 at 715-16 (2008 & Supp. 2010). In this case, this Court cannot consider the merits of Petitioner's petition for certiorari because intervening action by the Board and the Governor means that no decision by this Court could alter the parties' rights and obligations and so this case is now moot. *See DeFunis v. Odegaard*, 416 U.S. 312, 316-317, 94 S.Ct. 1704, 1705-1706, 40 L.Ed.2d 164, 168-169 (1974)(constitutional challenge to law school admission standardsmooted by law school registering plaintiff for final term); *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413, 415 (1971)(holding "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.")

Jurisdiction over a case abates if the case becomes moot because there is no reasonable expectation that the alleged violation will recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 630, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642, 649 (1979). Such is the case here. Events have overtaken the litigation and

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complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast*, 392 U.S. at 94-95.

state's appeal has become moot.

In granting habeas relief, the district court concluded that no evidence supported the Board's 2002 denial of parole. But the district court's remedy required the Board to set a term for Respondent Pirtle within a set number of days. Instead, the Board of Parole Hearings chose to conduct a new full parole suitability hearing for Respondent Pirtle. BIO Appendix, *passim*. At that hearing, the Board considered both the question of Pirtle's suitability for parole and set a term of confinement. The Board's new decision to grant Pirtle parole is now final. It was final under the Board's decision review process on December 8, 2010. The time for gubernatorial review, permitted by Article V, section 8(b) of the California Constitution, expired on January 7, 2011, shortly after the petition for certiorari was filed.

Whatever complaint Petitioner Cate may have with the district court's judgment, requiring only that the Board of Parole Hearings set Respondent Pirtle a term of imprisonment, cannot be remedied by this Court. The Board's intervening actions in considering anew Respondent Pirtle's suitability for parole, finding him suitable, and upholding that decision in the state administrative review processes, were independent of the district court's judgment. The Board's August 2010 grant of parole independently obligated the Board to set Respondent Pirtle's term. Thus, even if the district court erred, a ruling agreeing with Petitioner Cate on that question does

not affect the parties because the state parole board's unfettered and independent consideration of Respondent Pirtle resulted in the Board finding him suitable for parole. The Board then set Pirtle's total term of imprisonment at 124 months. As Pirtle had by then served over 30 years in custody for his commitment offense, that prison term is fully satisfied. Now that the time has expired for both the Board and the Governor to revisit the August 2010 parole decision, Respondent Pirtle's right to be released from prison to parole is final.

A case becomes moot when a party complies with a specific order of the district court and the appellate court is unable to undo the effects of that compliance. For example, the Sixth Circuit held that a parole board's remedial parole hearing rendered the board's appeal moot in *Preston v. O'Dea*, 1990 U.S. App. LEXIS 18582 (6th Cir. Oct. 19, 1990)(per curiam)(unpublished). Following the revocation of Preston's parole, Preston successfully sought federal habeas relief on the ground that the parole board failed to give him with a written statement of the evidence it relied on and the reasons for the revocation. The district court issued a conditional writ requiring Preston's release unless the parole board provided Preston with another hearing within 60 days that complied with due process. The warden filed a notice of appeal and moved to stay the district court's judgment pending appeal. The district court denied a stay and that decision was not appealed. *Id.* *2-*3 & n.1. During the pendency of

the appeal, the parole board complied with the district court's order by holding a new parole revocation hearing that complied with the district court's judgment. The court of appeals dismissed the appeal as moot explaining, "[t]he present appeal has been rendered moot by the Board's compliance with the district court's order and judgment. . . . [¶] This appeal is moot because there is no relief for this court to provide." *Id.* at *3-*4.

Similarly, in *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982), the district court ordered the release of prisoners to relieve unconstitutional overcrowding in Alabama's jails and, following the state's unsuccessful attempts to obtain a stay of the order in the district court, the court of appeals, and the Supreme Court, the prisoners were released. 683 F.2d at 1317 & n.11. The Eleventh Circuit dismissed the state's appeal from the release order explaining:

> The defendants have fully complied with that order directing release of specifically named inmates and accelerating parole eligibility for others. The [district court's] July order was not a continuing injunction; it merely required the State to perform certain discrete acts, which it did. No action by this court could change what has been done, and "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971).

Id. at 1317.

Thus, both this Court's and the various Circuit's decisions confirm that full

compliance with a district court's remedial order and an inability of the appellate court to undo that compliance will render the appeal moot. *Honig v. Students of California School for the Blind*, 471 U.S. 148, 149-50, 105 S. Ct. 1820, 85 L. Ed. 2d 114(1985) (per curiam)(question whether injunction requiring seismic tests of school grounds should have been issued mooted by completion of testing); *University of Texas v. Camenisch*, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)(injunctive relief appeal moot); *Christian Science Reading Room Jointly Maintained v. San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986)(in airport rental dispute, challenge was moot to orders directing the parties to cooperate and negotiate, and for airport to show all available rental space, because the orders had been fully complied with, and it was impossible to undo the effects of compliance); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (appellants sought to enjoin exploratory mining operations, but during appeal such work stopped by intervening events and exploratory permits expired; appeal moot).

Nor does the state's effort to obtain a stay in the appellate court change this analysis. In *E.E.O.C. v. St. Regis Paper Co.*, 717 F.2d 1302 (9th Cir. 1983), after both the district court and this Court had denied stay motions, the defendant complied with the challenged subpoena; that compliance mooted the appeal. The appellate court concluded that had the defendant "firmly objected," it could have refused to

comply and suffered contempt sanctions. *Id.* at 1303; *see also Matter of Bunker Ltd. Partnership*, 820 F.2d 308, 311 (9th Cir. 1987) (rejecting argument that courts will not find a case moot where a party has done everything possible to preserve the status quo). A party aggrieved by a district court's injunctive order may keep the controversy alive on appeal in one of two ways – it can obtain a stay pending appeal or it can refuse to comply with the district court's injunctive order, undergo a contempt adjudication, and challenge the validity of the injunctive order in an appeal from the contempt adjudication. *Burnett v. Kindt*, 780 F.2d 952, 954 (11th Cir. 1986); *see also United States v. Kis*, 658 F.2d 526, 534 (7th Cir. 1981) ("a contempt citation may . . . be the only means of gaining review when a question would otherwise become moot"). In this case, a stay was not obtained and the state did not refuse to comply with the district court's order. As noted above, the Board did more than comply with the order, it conducted a full new hearing on its own initiative. The petition for certiorari should be denied because this appeal is moot.

B. This Case Does Not Raise the Question Presented

Petitioner Cate seeks review in this case to address the federal appellate court's adoption of a state judicial review standard for evaluating the evidentiary sufficiency of a parole decision. This question is grounded in the proper application of the deference provisions of 28 U.S.C.§ 2254(d) and the Ninth Circuit's decision in

Hayward v. Marshall, 603 F.3d 546(9th Cir. 2010) (en banc)[adopting 2254(d) review focused on the correctness of the state court's application of the state-law based sufficiency of the evidence standard]. *Hayward* specifically refused to decide "whether a right arises in California under the United States Constitution to parole in the absence of some evidence of future dangerousness." *Id.* at 562.

In contrast to *Hayward* and *Cooke*, the appellate court in Respondent Pirtle's case did not consider whether the state courts properly applied a state evidentiary sufficiency standard of review. To the contrary, the federal appellate court independently determined the federal substantive due process question because it applied this Court's holding in *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), and determined the state courts had failed to adjudicate Respondent Pirtle's due process claim. While Petitioner Cate notes this fact,[5] he does not challenge th appellate court's analysis in his question presented or anywhere in his petition. Neither the federal substantive due process question nor the correctness of the Circuit's *Ylst* analysis is included in the single question Petitioner Cate presents; thus, neither of these questions can justify granting certiorari review. *See Illinois v. Gates*, 462 U.S. 213, 217, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)(holding case not proper vehicle for considering modification of Fourth Amendment exclusionary rule

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[5] *See* Petition for Certiorari, page 8.

(1983)(holding case not proper vehicle for considering modification of Fourth Amendment exclusionary rule where state's question presented only asserted no Fourth Amendment violation had occurred).

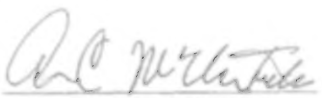
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: March 3, 2011

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender



ANN C. McCLINTOCK
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JOHN H. PIRTLE

No. 10-868

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW CATE, Secretary,

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Respondent.

CERTIFICATE OF SERVICE

I, Ann C. M[c]Clintock, counsel for Respondent John H. Pirtle, and a member of the Bar of this Court, certify that on March 3, 2011, a single copy of the BRIEF IN OPPOSITION and APPENDIX was served on all parties required to be served in compliance with Supreme Court Rules, by depositing the documents with Federal Express, addressed to counsel and the Clerk as follows:

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Executed at Sacramento, California, on March 3, 2011. I further certify that all parties required to be served have been served.

ANN C. M^c^CLINTOCK